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a certain sum in his hands, and gives bond to account for and pay over moneys coming to his hands during the term, the sureties on the bond for the second term will be responsible for the money so reported to have been in his hands, and will not be allowed to show that the defalcation in fact occurred during a previous term, so as to throw the liability on the sureties for the first term: *Roper* v. *Sangamon Lodge*, 91 Ill. 518; *Cawley* v. *People*, 95 Id. 249; *Morley* v. *Town of Metamora*, 78 Id. 394; and see *Board of Education* v. *Fonda*, 77 N. Y. 359: *United States* v. *Boyd*, 15 Pet. 187. Where the officer fails to make a report at the close of his first term, and to make a settlement, it will not be presumed that he paid the funds of the first term to himself as his successor, and the sureties on the first bond will be liable: *Coons* v. *People*, 76 Ill. 383.

7. Sureties on the official bond of a public officer are liable for acts done *virtute officii*, but not for those done *colore officii*: *Huffman* v. *Koppelkom*, 8 Neb. 344; *Ottenstein* v. *Alpaugh*, 9 Id. 237.

The liability of sureties on official bonds is not generally measured by the law requiring the sureties, but by that imposing the duties on the officer: *Dyer* v. *Covington Township*, 28 Penn. St. 186.

Of course no action can be maintained on an official bond for any misfeasance of any officer which is not within the terms of the condition of the bond, or in contemplation of the law requiring the bond: *Furlong* v. *State*, 58 Miss. 717.

8. In *Vann* v. *Pipkin*, 77 N. C. 408, the law fixed the term of office at two years, but required the bond to be renewed annually. The bond was given in September 1872, but was not renewed in September 1873, although the principal continued in office. The statute declared that a failure to renew the bond should create a vacancy in the office. The bond was conditioned for the faithful collection and payment of the taxes received during his term of office. The default occurred in 1874. The sureties were held liable. The court said the failure to renew the bond did not of itself create a vacancy in the office, and that it was necessary that proceedings should first be taken to declare the office vacant.

HENRY WADE ROGERS.

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## *United States Circuit Court, Northern District of Texas.*

### LAWRENCE *v.* NORTON.

An assignment for the benefit of those of the assignor's creditors who should release him, with a reservation of the surplus to the assignor himself, is fraudulent and void as to the creditors not releasing.

Statutes allowing preferences among creditors should be strictly construed, and assignments creating such preferences should be held void, when not in strict compliance with the terms of the law.

A Texas statute authorized any debtor to make an assignment for the benefit of such of his creditors only as would consent to discharge him, and provided that in such case the benefit of the assignment should be limited to such creditors. *Held*, that the statute must be confined in its operation to assignments which transferred all of the debtor's property for the benefit of creditors, and did not validate an assignment by which the debtor reserved to himself an interest in the surplus after paying the releasing creditors.

DEMURRER to petition.

This action was for damages for trespass in seizing and converting certain goods alleged by plaintiff to have belonged to him. Plaintiff set out his ownership as derived under a deed of assignment for the benefit of creditors, dated October 24th 1881, between the debtor of the first part, the assignee of the second part, and the creditors "who shall hereafter accede to these presents" of the third part, whereby the debtor assigned to I. G. Lawrence all his real estate and goods or chattels "in trust and confidence to sell and dispose of said real and personal estate, and to collect said choses in action, using a reasonable discretion as to the times and modes of selling and disposing of said estate, as it respects making sales for cash or on credit, at public auction or by private contract, taking a part for the whole where the trustee shall deem it expedient so to do; then in trust to dispose of the proceeds of said property in the manner following, viz:

1. To pay the cost and charges of these presents, and the expenses of executing the trusts herein declared, together with all taxes, which are a charge upon any of said property.

2. To distribute and pay the remainder of the said proceeds to and among all the parties of the third part who will accept thereof in full satisfaction of their claims against said party of the first part, ratably, in proportion to their respective debts.

3. To pay over any surplus, after paying all the parties of the third part who shall accede hereto, as aforesaid, in full, to the party of the first part, his executors, administrators or assigns, and the party of the first part hereby constitutes and appoints the party of the second part his attorney irrevocable, with power of substitution, authorizing him in the name of the party of the first part, or otherwise, as the case may require, to do any and all acts, matters and things, to carry into effect the true intent and meaning of these presents, which the party of the first part might do if personally present; and the party of the second part hereby accepting these trusts covenants to and with each of the other parties hereto, to execute the same faithfully; and the party of the first part hereby covenants with the said trustee, from time to time and at all times when requested, to give him all the information in his power respecting the assigned property, and to execute and deliver all such instruments of further assurance as the party of the second part shall be advised by counsel to be necessary in order to

carry into full effect the true intent and meaning of these presents, and the parties of the third part, by acceding hereto, and by accepting the benefits herein conferred, hereby and thereby agree to and with the said party of the first part, to release him from any and all claim or claims, debt or debts, demand or demands, of whatever nature, which they respectively have and hold against him, and this assignment is made for the benefit of such of the parties of the third part only as will consent to accept their proportionate share of the said estate of the said party of the first part and discharge him from their respective claims.

Defendant demurred.

*Henry & Hill*, for plaintiff.

*Crawford & Smith*, for defendant.

The opinion of the court was delivered by

PARDEE, J.—The demurrer presents the question whether the foregoing assignment is fraudulent on its face, and therefore void as against the assignor's creditors.

If it is valid and shall be carried out, and the trust administered according to the terms specified, its effect against creditors who do not grant the exacted release, will be to delay them, according to the discretion of the assignee, for an indefinite period in their remedies against the property upon faith of which they gave credit, if their remedies are not entirely lost; and finally, after this indefinite delay, remit them to proceedings against their original debtor, after his ass ts have been converted into ready cash, and put into his pocket beyond the reach of writs of *fieri facias*. In short, in such case the debtor has enacted a forced stay law during the discretion of his agent, to enable him to convert his property into such convenient shape that he may enforce other terms (to suit his convanience) with his already delayed creditors. If the assignment is held valid, but the trust is administered according to the state laws, which it is argued have the effect to validate all assignments, curing all frauds, in act or intent, and to a certain extent making a contract for the assignor, the effect is practically the same, except that if there is any surplus, after preferred creditors amd expenses, &c., are paid, it may be paid into court to be litigated for.

In this latter case as to the administration under the state law

a number of curious queries suggest themselves, which, if they were satisfactorily answered, might induce creditors to view assignments under the law with more favor. Where and when is the assignment to be recorded? When is it to take effect? How long may the assignee carry it in his pocket?

Suppose that no creditor accepts the terms of the debtor? Could the assignment be set aside? If so, when? After the full administration of the assignee, or at the expiration of four months? When is a dividend to be paid accepting creditors? When the assignee can pay 10 per cent. of the accepting creditor's claims, or when he has funds in hand sufficient to pay 10 per cent. of the debts due by "the assignee?"

Suppose the assignee can collect only enough, after reasonable compensation, necessary expenses and attorney's fee at discretion are paid, to pay 9 per cent. of the debts due by the assignor?

Many other questions suggest themselves, but all, including the foregoing, throw no light on this case—they being referred to only because the policy of the law has been discussed at the bar, and very ably justified and defended.

The assignment aforesaid makes several dispositions and conditions in conflict with the law which is relied on to maintain it, but the chief objection made to its validity is, that the assignment is not complete of the assignor's interests, but that the assignor reserves an interest in his own favor in the property assigned.

The Act of March 24th 1879, Texas Laws, Acts of 1879, chap. 53, p. 57, provides:

"Sect. 1. That every assignment made by an insolvent debtor, or in contemplation of insolvency, for the benefit of his creditors, shall provide, except as herein otherwise provided for, a distribution of all his real and personal estate other than that which is by law exempt from execution, among all his creditors in proportion to their respective claims, and however made shall have the effect aforesaid; and shall be construed to pass all such estate whether specified therein or not. Any and every assignment shall be proved or acknowledged and certified, and recorded in the same manner as is provided by law in conveyance of real estate or other property.

"Sect. 3. Any debtor desiring so to do may make an assignment for the benefit of such of his creditors only as will consent to accept their proportionate share of his estate, and discharge him

from their respective claims, and in such case the benefit of the assignment shall be limited and restricted to the creditors consenting thereto. The debtor shall thereupon be, and stand discharged from all further liabilities to such consenting creditors on account of their respective claims, and when paid, they shall execute and deliver to the assignee for the debtor a release therefrom."

Upon the construction of these two sections, and upon the common law the validity of the aforesaid assignment depends; see Article 3218, Revised Code of Texas.

It seems that by the sections aforesaid, two classes of assignments are allowed.

Under the first section, assignments for the benefit of all the creditors, which are aided by the law, and naturally would be favored by the courts.

Under the third section, assignments for the benefit of preferred creditors, who are preferred on their own election, under stress of a penalty forfeiting their claim, which assignment is not in terms aided by the law, and naturally is not favored by the courts.

Prior to the Act of 1879, an assignment, such as the one now under consideration, would have been adjudged void on its face, because therein the assignor reserved an interest in the estate assigned. [See the leading cases in Texas: *Baldwin* v. *Peet*, 22 Texas 708, and *Baily* v. *Mills*, 27 Id. 434; also *Barney* v. *Griffin*, 2 N. Y. (Comstock) Court of Appeals, 365; *Leitch* v. *Hollister*, 4 Id. 211.]

In the last cited case it is said, that "the effect of such an assignment is to withdraw the property of the debtor from legal process, and to compel creditors to await the execution of the trust before they can reach the surplus reserved to the former. As those who are excluded from the benefits of the assignment cannot enforce its execution, they are necessarily hindered and delayed, and consequently, in legal contemplation, defrauded. It is of no consequence whether the surplus is large or small, or whether anything remains after the payment of preferred creditors."

The creation of the trust shows that a surplus was in the contemplation of the parties, and its reservation for the benefit of the assignor, is a fraud upon creditors.

These cases, and the arguments so clearly expressed, have lost no force by lapse of time.

The statute aforesaid was passed in the sight of them, and I think it must be construed in harmony with them.

Counsel have handed in two late decisions of the Supreme Court of Texas, not yet reported, in which that learned tribunal has passed upon two cases arising under the statute aforesaid.

The first, *Blum* v. *Wellborn*, goes to the extent of holding that an assignment that evidences the intention to pass to the assignee all of the property of a debtor subject to a forced sale for the purpose of distribution among creditors, and executed in substantial compliance with the requirements of the act, will be aided by the law as to form, and will not be avoided by fraud between the assignor and assignee in secreting and appropriating portions of the property assigned.

In the second case, *Donoho* v. *Fish, Brothers & Co.*, it is held that the law cannot make an assignment for the debtor, but that it aids an assignment which evidences an intention of the debtor to comply with its provisions; that the provisions of the third section of the Act of 1879, must be construed in harmony with the principles laid down by the courts of the several states in which it has been held, in the absence of a statute, that such restrictions upon the rights of the creditors generally might be imposed by the debtor, and that an assignment containing such restrictions, which does not of itself, or with the aid of the law, transfer all of the debtor's property for the benefit of his creditors, is void upon its face.

Following these two cases, as to the construction to be given to the Act of 1879, keeping in mind that the law cannot make a contract for the debtor, and that where a debtor seeks to force releases from his creditors under the third section of the act, he must resign all of his property not exempt, I feel warranted in holding, under the lights to which the court refers me, and hereinbefore cited that, as in the assignment before the court the assignee has expressly reserved an interest to himself to the exclusion of his creditors, the same is on its face null and void and of no effect.

Under the principles of the civil law, declaring that the property of the debtor is the common pledge of all the creditors, and which principles are sound in justice and equity, all laws and acts preferring creditors ought to be strictly construed, and always avoided when not in strict compliance with the terms of the law.

On general principles, therefore, I am of opinion that the third section of the Act of 1879, as allowing an unfair and partial assignment, should be strictly construed, and, therefore, that the assignment in this case should be held null and void.

The other points argued will not be considered.

The demurrer to the amended original petition is sustained.

McCORMICK, J., concurred.

When will an assignment for the benefit of creditors be deemed fraudulent in law and void on its face, as against dissenting creditors, on the ground that it contains provisions for the benefit of the debtor himself to the prejudice of his creditors?

FIRST. *Reservations of Property.*—An assignment wherein the debtor reserves for his own use any portion of the property assigned, except such as is exempt by law from levy and sale on execution, is void. For example: an assignment stipulating for the payment of a specified sum, for the support of the debtor and his family for a limited time (*Mackie* v. *Cairns*, 5 Cow. 547); or during the continuance of the trust (*Richards* v. *Hazzard*, 1 Stew. & P. 139); or for the support of himself and wife while they live, and the rest of his family until able to maintain themselves (*Johnston* v. *Harvy*, 2 P. & W. 82); or a stipulation for the payment of the debtor's current family expenses before the payment of any debts: *Henderson* v. *Downing*, 24 Miss. 106. Compare *McAllister* v. *Marshall*, 6 Binn. 338; *Harris* v. *Sumner*, 2 Pick. 129; *Arthur* v. *Commercial Bank*, 17 Miss. 394; *Citizens' Fire Ins. Co.* v. *Wallis*, 23 Md. 173; *Whallon* v. *Scott*, 10 Watts 237.

An assignment is void which provides for the payment of the debtor's expenses in obtaining the benefit of the insolvent act, and the costs of defending actions by his creditors to recover their debts: *Sewall* v. *Russell*, 2 Paige 175; *Planck* v. *Schermerhorn*, 3 Barb. Ch. 644. The debtor cannot provide that his attorneys shall be paid a certain sum for future services and advice as to the execution of the trust, though a provision for payment of his attorneys for services in preparing the assignment and securing its proper proof and record, is valid: U. S. District Court, N. D. Miss., 1881; *Hill* v. *Agnew*, 12 Fed. Rep. 230.

An assignment is void which provides for the payment of the assignee for his future advances to, and future liabilities for, the assignor, in preference to, or to the exclusion of debts contracted prior to the assignment. Such an attempt to secure a future credit and benefit to the assignor cannot be sustained: *Barnum* v. *Hempstead*, 7 Paige 568; *Currie* v. *Hart*, 2 Sandf. Ch. 353. For the same reason, a provision for the security of all who should become indorsers for the debtor vitiates the assignment: *Lansing* v. *Woodworth*, 1 Sandf. Ch. 43. But the debtor may provide for the security of one who is contingently liable as indorser for him (*Barnum* v. *Hempstead*, *supra*), and hence an assignment to pay debts "due and to grow due," was held valid, as referring only to existing liabilities, whether matured or to mature: *Van Hook* v. *Walton*, 28 Tex. 59.

The assignment is not void by reason of the failure of the debtor to convey all his property, but by reason of his reservation of some part of the property *conveyed*. He may except a portion of his property from the operation of the conveyance, since as the title to such portion has

never passed to the assignee, it remains in his hands, open to the pursuit of creditors, as if no assignment had been made, and their remedies against it have not been hindered or delayed: *Carpenter* v. *Underwood*, 19 N. Y. 520; *Knight* v. *Waterman*, 36 Penn. St. 258; *Bates* v. *Ableman*, 13 Wis. 644; *Canal Bank* v. *Cox*, 6 Me. 395; *Ingraham* v. *Grigg*, 21 Miss. 22. Thus, an assignment of all the debtor's property of every description, "reserving to myself, however, out of the aforesaid" property, certain articles, was held invalid as a reservation out of the property conveyed (*Sugg* v. *Tillman*, 2 Swan 208); while in another case in the same state, an assignment of all the debtor's property "except such as is exempt from execution," was held valid, without regard to the fact of exemption, as an exception from the operation of the conveyance: *Farquharson* v. *McDonald*, 2 Heisk. 404.

A reservation of such property as is by law exempt from levy and sale on execution, will not make the assignment void, since the creditors are not hindered by the debtor's retaining that which they had no right to touch: *Mulford* v. *Shirk*, 26 Penn. St. 473; *Knight* v. *Waterman*, 36 Id. 258; *Lininger* v. *Raymond*, 9 Neb. 40. But the cases are in conflict as to the necessity of specifically describing the property reserved by the debtor under the exemption laws. Some authorities hold a specific mention of the property is not necessary, and that a reservation of "such property as is by law exempt," is valid: *Richardson* v. *Marqueze*, 59 Miss. 80; *Brooks* v. *Nichols*, 17 Mich. 38; *Hollister* v. *Loud*, 2 Id. 309; *Garnor* v. *Frederick*, 18 Ind. 507; *Mulford* v. *Shirk*, 26 Penn. St. 473. A reservation of the "benefit of any and all exemption laws," will not avoid the assignment: *Heckman* v. *Messinger*, 49 Penn. St. 465. On the other hand, an assignment reserving "so much as I am by law allowed to retain free from execution," has been held void, the court saying: "How are excluded creditors to know what articles in particular are claimed under those acts (of exemption), if they are thrown into confusion with a large quantity of the same nature and description. The person claiming the benefit of exemption must set apart what the law allows him, that it may be known by all who are concerned, and separated from that part of his estate which is subject to his debts. But in this deed, it is included in the conveyance with the mass of his property and reserved in general terms. Creditors are not able to judge whether the quantity or kind of property specified in the law is claimed, as there is no separation or description of it:" *Sugg* v. *Tillman*, 2 Swan 208. An assignment reserving "property to the value of $400 each which said" assignors "shall elect to retain as stock in trade under the laws of the State of Kansas exempting certain property from sale on execution or other process," was held void on its face (*Clark* v. *Robbins*, 8 Kans. 574); though the same court held an assignment by a partnership of all their property "except what is by law exempt," valid, the provision being nugatory, as none of the assigned property was exempt: *Dodd* v. *Hills*, 21 Kans. 707.

SECOND. *Reservation of possession and control.*—If the debtor reserves the right to retain possession of the property assigned, or stipulates for its use, this is deemed a reservation for his benefit inconsistent with the right of creditors, and will, in general, render the assignment void: *Spence* v. *Bagwell*, 6 Gratt. 444; *Sheppards* v. *Turpin*, 3 Id. 378; *Lockhart* v. *Wyatt*, 10 Ala. 231; *Montgomery's Ex'rs* v. *Kirksey*, 26 Id. 172; *King* v. *Kenan*, 38 Id. 63; *Knight* v. *Packer*, 12 N. J. Eq. 214. An assignment reciting that it was understood that the debtor might retain possession until default in payment, was held void: *Reed* v. *Pelletier*, 28 Mo. 173. And the vice of such a stipulation is not cured by a

provision that the assignor shall give bond, with good security, to the assignee, to deliver the property on the day of sale. He has no right to substitute such security for the property assigned : *Green* v. *Trieber*, 3 Md. 11. But this rule has not been fully adopted in some cases. Thus, it has been held that a stipulation to retain possession as the agent of the trustees and under their control, was valid (*Janney* v. *Barnes*, 11 Leigh 100, as explained in *Sheppards* v. *Turpin*, 3 Gratt. 373) ; and in a later case in the same State, an assignment reserving possession until a specified day and the right to receive the profits of business unless the assignor consented to an earlier sale of the property, was held not void on its face, on the authority of prior decisions, though their soundness was doubted : *Dance* v. *Seaman*, 11 Gratt. 778. In a recent case, a deed of trust, conveying, among other property, land, horses, cattle, farming implements, household and kitchen furniture, growing grain and vegetables, and stipulating for possession by the grantor for three years, upon his paying interest on the debts provided for, was held not fraudulent *per se*, although some of the property reserved would be consumed in the use. It might indirectly strengthen the security by ministering to the improvement and support of the important and substantial subjects, relied on as security : *Sipe* v. *Earman*, 26 Gratt. 563. It is to be noticed, moreover, that this property could not have been made available to a judgment creditor, by reason of the stay law. In *Baxter* v. *Wheeler*, 9 Pick. 21, an assignment, containing a covenant on the part of the trustees to allow the assignor to use and occupy the property, committing no waste thereon, until it should be sold or disposed of in the due execution of the trust, was held not *per se* fraudulent. In *Young* v. *Booe*, 11 Ired. L. 347, a deed of trust of a cotton factory, providing that the grantor might retain possession for eleven months, and his family be supported during that time, out of the profits of the business, was held not necessarily void, but that the question was for the jury whether the provisions were for the benefit of the creditors. See also, *Moore* v. *Collins*, 3 Dev. 126. In *Perry Ins. Co.* v. *Foster*, 58 Ala. 502, an assignment reserving possession of growing crops to be delivered to the trustee as soon as gathered, was sustained. If the time fixed for sale of the assigned property be reasonable, a reservation of possession until sale, is not a badge of fraud : *Hempstead* v. *Johnston*, 18 Ark. 123.

The equitable interests in the assigned property should be fixed and determined irrevocably in the assignment itself, and nothing should be left subject to the future control or discretion of the assignor : *Barnum* v. *Hempstead*, 7 Paige 568 ; *Pierson* v. *Manning*, 2 Mich. 445. If the assignor reserves the right of revoking or altering the trusts, the assignment is void : *Murray* v. *Riggs*, 15 Johns. 571. He cannot reserve the right to give a subsequent preference (*Sheldon* v. *Dodge*, 4 Dev. 217 ; *Hyslop* v. *Clarke*, 14 Johns. 458 ; *Kercheis* v. *Schloss*, 49 How. Pr. 284 ; *Mitchell* v. *Stiles*, 13 Penn. St. 182) ; although he fixes a definite time within which to declare the preference : *Averill* v. *Loucks*, 6 Barb. 470. It has been held, however, that an assignment is not void on its face, which reserves to the assignor the privilege of adding to the number of preferred creditors, others of the same class : *Cannon* v. *Peebles*, Ired. L. 204. And the same was held of an assignment "to pay such other debts as we (assignors) may hereafter specify, out of any surplus, which may be left after paying all the claims and debts in this deed of assignment first specified :" *Hall* v. *Wheeler*, 13 Ind. 371.

A reservation of the right to appoint another trustee in place of the one named (*Fellows* v. *Commercial Bank*, 6 Rob. (La.) 246), or to name his successor

(*Planck* v. *Schermerhorn*, 3 Barb. Ch. 644), vitiates the assignment, though a reservation of power to appoint a subsequent trustee in case the one named declines to accept the trust, is valid: *Vansands* v. *Miller*, 24 Conn. 180.

The services of the assignor may be almost indispensable to the assignee in the execution of the trust, and although the assignment is not avoided by a clause empowering him to employ the assignor in winding up his affairs, if he thinks proper (*Planters'* v. *Merchants' Bank of Mobile*, 7 Ala. 765; *Coate* v. *Williams*, 21 L. J. Exch. (N. S.) 116; 9 Eng. L. & Eq. 481; *Marks* v. *Hill*, 15 Gratt. 400), it is void if it stipulates that the assignee shall employ him: *McClurg* v. *Lecky*, 3 Penn. & W. (Pa.) 83. In *Rindskoff* v. *Guggenheim*, 3 Cold. 284, the assignment contained a clause that the trustee "is to employ clerks, including" the assignor, but it was held valid, the court regarding the matter as left entirely to the discretion of the trustee.

An assignment which stipulates that the debtor shall have the right to continue business and to sell and dispose of the goods assigned in the usual course of business, is void: *Holmes* v. *Marshall*, 78 N. C. 262; *Brooks* v. *Wimer*, 20 Mo. 503; *Billingsley's Admr.* v. *Bunce*, 28 Id. 547; *King* v. *Kenan*, 38 Ala. 63; *Berry* v. *Riley*, 2 Barb. 307; *Hill* v. *Agnew*, 12 Fed. Rep. 230; *Smith* v. *Leavitts*, 10 Ala. 92. An assignment empowering the trustee at his discretion to sell the property, consisting of a stock in trade "gradually, in the manner and on the terms on which in the course of their business," the assignors "have sold and disposed of their merchandise" is void on its face, and cannot be made good by proof that the provision was inserted for the benefit of creditors and was to their advantage: *American Exchange Bank* v. *Inloes*, 7 Md. 380; 11 Id. 173.

THIRD. *Stipulations for release.*—The question is, whether an assignment is rendered fraudulent and void on its face, by reason of a stipulation for release of the debtor in full, either as a condition of *participation* in the benefits of the assignment, or as a condition of *preference*. To adopt the language of the court in *Gordon* v. *Cannon*, 18 Gratt. 410; "No man can read Burrill on Assignments, in which all or nearly all the cases on this subject are collected, without being struck, if not confounded, by the great conflict among them. Not only does this conflict exist between the decisions of one State and those of another, but often the decisions of the same state are conflicting in themselves. Courts after going in one direction have veered about and gone in another, until the legislature has had to interpose and solve the difficulty."

In New York, the doctrine against the validity of assignments containing stipulations for release has been carried to the extent of holding the assignment void when the release is made a condition of *preference* merely. "Why should a debtor be permitted in this way to operate upon the fears of his creditors, and coerce them into his own terms. * * * If a debtor, therefore, with his property in his own hands, and open to the legal pursuit of his creditors, can satisfy them that it is for their interest or the interest of any of them, to accept 2*s*. 6*d*. in the pound, and give him an absolute discharge, there is no legal objection to it; they treat upon equal terms; the ordinary legal remedies of the creditors are not obstructed. But the case is materially changed when the debtor first places his property beyond the reach of his creditors, and then proposes to them terms of accommodation. He obstructs their legal remedies, hinders and delays them in the prosecution of their suits by putting his property into the hands of trustees, with the view of getting an absolute discharge from his debts, and exempting his future acquisitions from all liability. It has been decided in this court, that the reservation of the least

pecuniary provision for the assignor or his family, renders an assignment of this description fraudulent and void. How much more valuable is a discharge from his debts, or a portion of them, to an insolvent debtor, than a temporary pecuniary pittance. Let the embarrassed debtor, therefore, assign his property for the benefit of whom he pleases; but let the assignment be absolute and unconditional; let it contain no reservations or conditions for the benefit of the assignor; let it not extort from the fears and apprehensions of the creditors or any of them, an absolute discharge of their debts as the consideration of a partial dividend; let it not convert the debtor into a dispenser of alms to his own creditors; and above all, let it not put up his favor and bounty at *auction* under the cover of a trust, to be bestowed upon the highest bidder." Per SUTHERLAND, J., in *Grover* v. *Wakeman*, 11 Wend. 187. The contrary doctrine, so far as to allow such stipulations as a condition of preference, has been maintained in several States: *Gordon* v. *Cannon*, 18 Gratt. 387; *Nightingale* v. *Harris*, 6 R. I. 321; *Rankin* v. *Lodor*, 21 Ala. 380: *Finlay* v. *Dickerson*, 29 Ill. 9. "This must be regarded as a mode of creating a preference among creditors, and the act of the releasing the debts voluntary on the part of the creditors, and therefore not objectionable:" *Hall* v. *Denison*, 17 Vt. 310.

Upon the question of the validity of assignments which make a release a condition of *participation* in any of the benefits of the assignment, judges and text-writers disagree as to the weight of authority. In a recent case, of first impression, in Arkansas, the decisions on the point were reviewed at length, and the weight of authority declared to be in favor of the validity of such assignments: *Clayton* v. *Johnson*, 36 Ark. 406. This doctrine, except as affected by statute, is firmly established in Pennsylvania (*Lippincott* v. *Barker*, 2 Binn. 174; *Bayne* v. *Wylie*, 10 Watts 309; *Wilson* v. *Kneppley*, 10 S. & R. 439; *Lea's Appeal*, 9 Barr 504); is maintained in Virginia on the authority of prior decisions, though its soundness is questioned (*Gordon* v. *Cannon*, 18 Gratt. 387; *Skipwith's Ex'r* v. *Cunningham*, 8 Leigh 271; *Kevan* v. *Branch*, 1 Gratt. 274); and is held in other states: *McCall* v. *Hinkley*, 4 Gill 128; *Haven* v. *Richardson*, 5 N. H. 113; *Canal Bank* v. *Cox*, 6 Me. 395; *Nostrand* v. *Atwood*, 19 Pick. 281; *Aiken* v. *Price*, Dudley 50; *Rankin* v. *Lodor*, 21 Ala. 380; *Dockray* v. *Dockray*, 2 R. I. 547. In England, such an assignment has been held valid even against a claim of the crown: *King* v. *Watson*, 3 Price (Exch.) 6. As upholding the New York doctrine, declaring such assignments fraudulent and void: see *Hyslop* v. *Clarke*, 14 Johns. 458; *Lee* v. *Tulcott*, 19 N. Y. 146; *Austin* v. *Bell*, 20 Johns. 442; *Seaving* v. *Brinkerhoff*, 5 Johns. Ch. 329; *Atkinson* v. *Jordon*, 5 Ohio 289; *Conkling* v. *Carson*, 11 Ill. 503; *Henderson* v. *Bliss*, 8 Ind. 100.

In those states, upholding such assignments, it is held essential that *all* the property of the debtor should be conveyed to the assignee: *Green* v. *Trieber*, 3 Md. 11; *Sangston* v. *Gaither*, Id. 40. Hence, if an assignment by partners exacts releases, it is deemed fraudulent and void, unless it conveys the separate property of each partner as well as the partnership assets: *Thomas* v. *Jenks*, 5 Rawle 221; *Hennessey* v. *Western Bank*, 6 W. & S. 300. *In re Wilson*, 4 Penn. St. 430; *contra*, *Spencer* v. *Jackson*, 2 R. I. 35. The assignment is valid if it conveys *substantially* all the debtor's property: *Gordon* v *Cannon*, 18 Gratt. 387. Thus, an assignment by a firm, which stipulated for releases, was held not void, because a house and lot belonging to a partner, which was encumbered beyond its full value, was not included in the conveyance: *Fassit*

v. *Phillips*, 4 Whart. 399. As to the effect of an express or implied reservation of the surplus to the grantor, in an assignment stipulating for releases, see *infra*.

It is also essential that such an assignment should fix the time within which creditors must make their election. If it fixes *no* time, within which the release must be executed, it is void: *Mayer* v. *Shields*, 59 Miss. 107. The reason of this is obvious. If "no time whatever is specified, the deed necessarily and inevitably works a fraud on creditors. None of them can receive anything until all have made up their minds, and as no time is fixed within which they must do this, the trust can never be wound up, save by the interposition of a court of equity:" Id. The assignment is void if it fixes an *unreasonable* time, within which creditors must elect. What is a reasonable time depends on the circumstances of the case. "It must not be so short as to deprive creditors of a fair opportunity to investigate and determine the question, nor yet so long as to produce unreasonable delay in the application of the property to the liquidation of the debts:" Id. See, also, *Gordon* v. *Cannon*, 18 Gratt. 387; *Halsey* v. *Whitney*, 4 Mason 206; *Henderson* v. *Bliss*, 8 Ind. 100; *Pearpoint* v. *Graham*, 4 Wash. C. C. 232.

FOURTH. *Reservation of Surplus.* When will a reservation to the debtor of the surplus remaining after satisfying the purposes of the trust render the assignment void on its face? Where the assignment provides for the payment of all the debts, it is not avoided by a provision for re-assignment of any property or re-payment of any surplus in the hands of the assignee after fulfilling the trust, as this is no more than the law implies without any such provision: *Sangston* v. *Gaither*, 3 Md. 40; *Wintringham* v. *Lafoy*, 7 Cow. 735; *Hempstead* v. *Johnston*, 18 Ark. 123; *Lininger* v. *Raymond*, 9 Neb. 40. And there is no distinction in this respect between an assignment by a bank or other corporation and one by an individual: *Dana* v. *Bank of U. S.*, 5 W. & S. 223.

Where an assignment provides for only a *part* of the creditors, and reserves to the assignor the surplus after the payment of the debts provided for, it is held in New York and a few other states, to render the assignment fraudulent and void on its face, and that it cannot be made good by showing that there would be no surplus after paying the preferred creditors: *Goodrich* v. *Downs*, 6 Hill 438; *Barney* v. *Griffin*, 2 N. Y. 365; *Lansing* v. *Woodworth*, 1 Sandf. Ch. 43; *Curtis* v. *Leavitt*, 15 N. Y. 9; *Fairchild* v. *Hunt*, 14 N. J. Eq. 367; *Truitt* v. *Caldwell*, 3 Minn. 364; *Lill* v. *Brant*, 6 Bradw. 366; *Schwab* v. *Evans*, Id. 466. Thus, where a firm assigned all the firm property and certain real estate of which the partners were tenants in common, and reserved the surplus after payment of the firm debts, the assignment was held void, because of the reservation without providing for payment of the individual debts of the partners: *Collomb* v. *Caldwell*, 16 N. Y. 484; *Goddard* v. *Hapgood*, 25 Vt. 351: *Therasson* v. *Hickok*, 37 Id. 454; though it would have been otherwise if firm property only had been assigned: *Collomb* v. *Caldwell*, *supra*; *Bogert* v. *Haight*, 9 Paige 297, 302. But an assignment of a portion of the debtor's property to pay part of his debts, and not expressly providing for distribution of a possible surplus among his other creditors, is not void on its face by reason of the resulting trust in the debtor's favor after the debts specified are paid, unless it is merely colorable and made for the sake of the resulting trust: *Wilkes* v. *Ferris*, 5 Johns. 335; *Doremus* v. *Lewis*, 8 Barb. 124; *contra*, *Pierson* v. *Manning*, 2 Mich. 445. An assignment of property, insufficient to pay the debts provided for, is not rendered void by the absence of any

provision for the application of a surplus to other creditors: *Bishop* v. *Halsey*, 3 Abb. Pr. 400; nor by an express reservation according to *Andrews* v. *Ludlow*, 22 Mass. 28; *Richards* v. *Levin*, 16 Mo. 596. On the other hand, an assignment, to pay specified debts, of a larger amount of property than the trustee is authorized to distribute, is void, because of the resulting trust to the assignor after those debts are paid: *Hooper* v. *Tuckerman*, 3 Sandf. 311; *Whallon* v. *Scott*, 10 Watts 237.

That assignments to pay only part of the assignor's creditors, and expressly reserving the surplus, are not necessarily void, is maintained by the weight of authority, on the ground that the reservation is but the expression of the legal effect of the conveyance, and that creditors can pursue their remedies against the debtor, following the surplus either in his hands or those of the trustee: *Perry Ins. Co.* v. *Foster*, 58 Ala. 502; *Miller* v. *Stetson*, 32 Id. 161; *New Albany, &c., Railroad Co.* v. *Huff*, 19 Ind. 444; *Livingston* v. *Bell*, 3 W. & S. 198; *Ely* v. *Hair*, 16 B. Mon. 230; *Rowland* v. *Coleman*, 45 Ga. 204; *Dance* v. *Seaman*, 11 Gratt. 778; *Johnson* v. *McAllister's Assignee*, 30 Mo. 327. "This reservation of the surplus remaining after the payment of the debts secured by the terms of the assignment, is obviously nothing more than a stipulation for the performance of a duty which the law would recognise and enforce without such stipulation; and how it can become a *conclusive* badge of fraud, is, on principle, difficult to perceive:" *Floyd* v. *Smith*, 9 Ohio St. 546.

The cases are in conflict, without any decided preponderance of authority, as to whether an assignment stipulating for a release is rendered invalid by reason of a reservation to the assignor of the surplus after satisfying the claims of creditors who consent to release the debtor. The doctrine of the principal case, that an express reservation of the surplus in such an assignment avoids it, is supported by the decisions of several states: *Hyslop* v. *Clarke*, 14 Johns. 458; *Berry* v. *Riley*, 2 Barb. 307; *Green* v. *Trieber*, 3 Md. 11; *McFarland* v. *Birdsall*, 14 Ind. 126. And it is held that an *implied* reservation of the surplus, where the assignment makes no disposition of that remaining after paying releasing creditors, vitiates the assignment equally with an express reservation: *Malcolm* v. *Hodges*, 8 Md. 418; *Bridges* v. *Hindes*, 16 Id. 101; *Whedbee* v. *Stewart*, 40 Id. 414. In a recent case in the U. S. District Court for Mississippi, an assignment making a release in full a condition of payment of a certain per cent. of the debt, without providing for a distribution of any surplus among the non-assenting creditors, was held void on its face, although it provided for the payment of all other creditors out of the surplus remaining after paying the specified per cent. of the preferred debts, as it appeared from the face of the assignment and schedule annexed that nothing would be left to the non-assenting creditors. "The vice of the release demanded cannot be cured by a contingency, which it is apparent from the face of the conveyance, schedule and proof, can never take place:" *Seale* v. *Vaiden*, 10 Fed. Rep. 831.

That an assignment stipulating for a release is not necessarily void, although it do not direct any surplus which may remain after satisfying the claims of the accepting and releasing creditors to be applied to the payment of other debts, or even though it direct any such surplus to be paid to the debtor himself, is maintained by a number of authorities: *Gordon* v. *Cannon*, 18 Gratt. 387; *Haven* v. *Richardson*, 5 N. H. 113; *Conkling* v. *Carson*, 11 Ill. 503; *Finlay* v. *Dickerson*, 29 Id. 9; *Todd* v. *Buckman*, 11 Me. 41; *Livingston* v. *Bell*, 3 Watts 198; *Mechanics' Bank* v. *Gorman*, 8

W. & S. 304; *Brown* v. *Lyon*, 17 Ala. 659. In *Nightingale* v. *Harris*, 6 R. I. 321, such an assignment was held not vitiated by an *implied* reservation to the assignor of the surplus, it being shown from the relative value of the property assigned, and the amount of the debts, that no resulting trust could result to the debtor.

WAYLAND. E. BENJAMIN.

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*Supreme Court of Iowa.*

## GREEN *v.* WILDING.

When the court can pronounce the contract of an infant to be to his prejudice, it is void, and when to his benefit, as for necessaries, it is good; and when the contract is of an uncertain nature, as to benefit or prejudice, it is voidable only at the election of the infant.

A conveyance of land by an infant for a money consideration, not shown to have been inadequate, is voidable at the election of the infant within a reasonable time after attaining majority.

What is a reasonable time within the meaning of the statute, depends upon the circumstances of each case.

Where the only excuse offered for a delay of three or four years in bringing suit to avoid the conveyance of a minor was, that plaintiff was informed by others than those competent to give legal advice, that she could not maintain a suit till her younger brother reached his majority, and she waited three months, after being informed that she could disaffirm her contract, before commencing action. *Held*, that the act of disaffirmance was not within a reasonable time.

APPEAL from Pottawattamie District Court.

This was an action in equity to compel the defendant to reconvey to the plaintiff the undivided one-third of certain eighty acres of land. The court dismissed the plaintiff's petition. The plaintiff appealed. The facts are stated in the opinion.

*Ament & Sims*, for appellant.

*Wright & Baldwin*, for appellee.

The opinion of the court was delivered by

DAY, J.—In 1869, one C. H. Barton died seised of the land in question, leaving his widow, Rebecca Barton, and his children, Charles B. Barton and the plaintiff, his sole legal heirs. On the 19th of February 1872, Rebecca, Ida and Charles Barton, for the consideration of $800, conveyed the land in controversy to the defendant. At the time of this conveyance the plaintiff was